As stated above, I had found as a fact that the package concerned were in the circumstances of this case in the custody or under the control of the accused at the relevant time and that was why he was deemed to have been in possession of them by virtue of the said statutory presumption under section 37(d) of the Dangerous Drugs Ordinance, 1952. But as pointed out by both Taylor J. and Thomson J. (as they then were), the feature which distinguishes possession from custody or control is the power of disposal. In a case such as this, if an accused person can show, on the balance of probabilities, that although he had something in his custody or under his control yet he did not have the power of disposal, then, in my judgment, he would have rebutted the presumption under the said section 37(d) of the Dangerous Drugs Ordinance, 1952, and would have shown that his custody or control of the things concerned did not in the circumstances amount to possession under the said Ordinance.

As far as I am aware, the expression "power of disposal" has not been examined in any written judgment. As regards the word "power" by itself I found in *Stroud's Judicial Dictionary* the following definition: —

"A power is an authority reserved by, or limited to, a person to dispose, either wholly or partially, of real or personal property, either for his own benefit or for that of others. The word is used as a technical term, and is distinct from the dominion which a man has over his own estate by virtue of ownership" (Farwell, 1).

But the word "power" alone, to use its ordinary dictionary meaning, simply means the ability to do something or anything and the said expression "power of disposal" which is not, in my opinion, used as technical words, was, I think, used by Taylor J. and Thomson J. (as they then were) in the abovementioned cases to mean the ability to deal with a movable thing as owner to the exclusion of others. There is therefore a power of disposal, and therefore possession in law where a person is so situated with respect to a movable thing, such as a dangerous drug in this case, if he has the power to deal with it as owner to the exclusion of all other persons and when the circumstances are such that he may be presumed to do so in case of need. Now on the evidence adduced in this case by the defence and accepted by me, I found that the packages concerned belonged to the two Europeans who had received them from a male Chinese that day and had asked the accused's permission to allow them to be kept in his house temporarily. In those particular circumstances I therefore found as a fact in this case that although the accused had custody or control over the packages concerned at the time the police officers raided his house, he did not have the power of disposal over the said packages in the sense of being able to deal with them in the circumstances as owner to the exclusion of all others including the said two Europeans. Or, in other words, to apply the observations made by Thomson J. (as he then was) in the said case of *Chan Pean Leon* v. *Public Prosecutor*[8] there was no *animus possidendi* that is, the intention as a matter of fact of dealing with the packages as if they belonged to him should he see any occasion to do so. As the evidence adduced by the defence in this case had, on the balance of probabilities, rebutted the said presumption under section 37(d) of the Dangerous Drugs Ordinance, 1952, I therefore found the accused not guilty of the offence of possession of dangerous drugs under the above charge as amended at the conclusion of the case for the prosecution, and acquitted and discharged him accordingly. In conclusion it must be noted in this particular case that the accused was, in the amended charge, charged for possession only and not for custody or control of the drugs in question. I would also add, in fairness to the prosecution, that it did not make another application to amend the charge a second time at the end of the case for the defence, which application, I would, in any case, have refused.

Accused acquitted and discharged.

Solicitors: *Jag-Jit Singh & Co.; C.V. Prabhakaran & Co.*

PUBLIC PROSECUTOR v. VIJAYA RAJ

[A.Cr.J. (Wan Yahya J.) May 15, 1980]
[Malacca — Criminal Appeal No. 37 of 1978]

Criminal Law and Procedure — Charge of misappropriation of school funds — Acquittal and discharge by lower court — Appeal — Duty of Court of Appeal.

Criminal Law and Procedure — Appeal filed out of time — Whether court competent to hear appeal — Criminal Procedure Code (F.M.S. Cap. 6), s. 307(1)(ix).

This is an appeal against the decision of the lower court in acquitting the respondent, a former headmaster of three charges of misappropriation of school funds. The respondent's duty as ex officio Secretary to the Board of managers of the school was to maintain account books, collect moneys and issue cheques on behalf of the school. With the implicit trust of the chairman of the Board, he had complete control over the financial affairs of the school.

As regards the first two charges, it was proved by the prosecution that the respondent had issued two cheques for $127.77 and $225.00 respectively unaccompanied by any voucher. The cheques for $127.77 was paid to Wearne Brothers as monthly instalments towards the hire-purchase of his wife' car.

A third cheque for the sum of $1,964.00 filled up in the respondent's own handwriting and endorsed by the chairman constituted the subject matter of the third charge.

The respondent was acquitted on the first two charges at the close of the prosecution case on July 15, 1978. Defence was called in respect of the third charge only, on which he was finally acquitted on November 6, 1978. The appellant filed an appeal on November 14, 1978 on all the charges.

Held: (1) the discretion for intervention would only be proper on an application by the person debarred from appealing. As no such applications had been made in this case, the court could not overlook the strict formalities and requirements laid down under section 307(1)(ix) of the Criminal Procedure Code. Both appeals were therefore incompetent;

(2) on the whole, the learned President in this case had failed to take proper consideration of facts which were immensely material towards the determination of the respondent's intention and consequently, the prosecution's case. Had he weighed the evidence he would have arrived at a different conclusion entirely;

(3) it is the duty of the court on appeal to review all evidence presented before the lower court and, if it feels that certain material facts have been missed or improperly considered by the presiding President or magistrate, than it should not hesitate from performing its duty as a judge of facts to consider and weigh those facts and decide whether those facts could have altered their judgment in one way or other;

(4) the order of acquittal in respect of the third charge should be set aside and substituted with that of conviction.

Observations made on duties and responsibilities of teaching profession.

Case referred to:-

(1) *Yoong Hock Pin* v. *Public Prosecutor* [1977] 1 M.L.J. 178.

CRIMINAL APPEAL.

Zaki bin Haji Hussain (Deputy Public Prosecutor) for the appellant.

Edgar Joseph Jr. for the respondent.

Cur. Adv. Vult.

Wan Yahya J.: This is an appeal by the Public Prosecutor against the decision of the President Sessions Court, Melaka, wherein he acquitted and discharged the respondent on the 1st and 2nd charges at the close of the prosecution case and the 3rd charge at the conclusion of the defence case.

The respondent was the former headmaster of the Merlimau English School. As a headmaster he was also *ex officio* Secretary to the Board of Managers of the school. It was his duty to maintain account books, to collect moneys from government and private sources and credit them into the school accounts; to make out various cheques for teachers' salaries and teaching allowances. He was also authorised to draw out and expend money for other activities connected with the school. In fact, with his practical involvement and experience, his superior knowledge and authority in the school plus the implicit trust the Chairman of the Board, a retired P.W.D. technician, had on him, gave the respondent an almost complete domain over the financial affairs of the school. Cheques for payment out from the school would normally be accompanied by vouchers prepared by the respondent, but whether supported by vouchers or not, the Chairman would nevertheless sign them. Such was the influence of the respondent on the Chairman. It may be fair to say that in some ways the Chairman was blissfully and helplessly ignorant of the financial dealings when he set his signature on the cheques.

Anyway he remembered signing a cheque for $127.77 (subject-matter of the 1st charge). The cheque was not accompanied by any voucher. This was subsequently found to be signed by the respondent himself and no mention was made in the column provided of the purpose of such a payment. The cheque was proved by the prosecution to have been subsequently paid by the respondent to Wearne Brothers as the monthly instalment towards the hire purchase of his wife's car.

Another cheque of $225 (subject-matter of the 2nd charge) was paid out in exactly similar circumstances.

The Chairman also recalled signing a third cheque dated December 3, 1971 for $1,964 (subject-matter of the 3rd charge). The cheque was filled up in the respondent's own handwriting and was brought to the Chairman by the school peon.

It may be convenient at this stage to deal first with the 1st and 2nd charges. Now, as mentioned earlier, the learned President had acquitted and discharged the respondent on these charges at the close of the prosecution case. The grounds which have prompted the President in doing so ran through an entire 5 foolscap typewritten pages but which, in the laconic language of counsel for the respondent, meant the absence of two vital ingredients, i.e. entrustment and intention. But the most vital issues raised by counsel is the competence of this court to hear an appeal which has been filed out of time. The respondent was acquitted on the first two charges at the close of the prosecution case on July 15, 1978. Defence was called in respect of the 3rd charge only, on which he was finally acquitted on November 6, 1978. The appellant filed an appeal on November 14, 1978 on all the charges. Although the appeal in respect of the 3rd charge was filed within the 10 days' period as prescribed under section 307 of the Criminal Procedure Code, it was not so in respect of the 1st two charges. Section 307(i) reads:

> "Except in a case to which section 304 applies and subject to the provisions of sections 305 and 306 any person who is dissatisfied with any judgment sentence or order pronounced by any Magistrate's Court in a criminal case... may prefer an appeal to a court of a judge against such judgment, sentence or order... by lodging within ten days from the time of such judgment, sentence or order being passed or made, with the clerk of such Magistrate's Court a notice of appeal in triplicate...."

It is perceivable from the records here that the orders acquitting the respondent in respect of the 1st and 2nd charges were made by the learned President on September 15, 1978 at the close of the prosecution case and not on November 6, 1978 when he acquitted the respondent on the 3rd charge. For the purposes of these two charges the ten days' period referred to in that section ran from September 15, 1978 itself and not from the date of his acquittal on the 3rd charge. The period of appeal in respect of the 1st and 2nd charges had therefore lapsed on September 26, 1978 and the appeal would have been deemed to have been withdrawn by virtue of paragraph (ix) of subsection (i) of section 307 unless permitted by a judge exercising his powers under section 310, which reads as follows:

> "A judge may, on the application of any person desirous of appealing who may be debarred from so doing upon the ground of his not having observed some formality or some requirement of this Code, permit an appeal upon such terms and with such directions to the Magistrate and to the parties as such judge shall consider desirable, in order that substantial justice may be done in the matter."

It would appear from the above that the discretion for intervention would only be proper on an application by the person debarred from appealing. As no such application has been made, the court could not overlook the strict formalities and requirements laid down under section 307(1)(ix). Both appeals are therefore incompetent. As I have ruled so it would not be necessary for me to discuss the merits of the President's grounds much as I disagree with his views on entrustment and the cited authority of *Yoong Hock Pin* v. *Public Prosecutor*.[1] I would only make a passing comment that the case of *Yoong Hock Pin* is distinguished from the present case in that there were doubts about the money he was entrusted with and therefore the amount he had actually misappropriated. In our present case the money was the entire school

fund remaining in the bank at the time when the cheques were drawn and in respect of which he had a duty to account for to the Board of Managers and the Government auditors. He was responsible for the collection of moneys due to the school and crediting them into the fund. He made out all the cheques and his signature appeared on them as one of three authorised drawees of the account. When he drew out a cheque for payment from the bank, he was in effect authorising money to be paid out from the fund of which he had control. When a person is given charge of, or asked to look after, an amount of money in a safe or a box, he cannot say that he has not been entrusted with any sum which he subsequently takes out of the safe or box simply because the sum so taken comes from, and is a part of, the entire money in the safe. Whether he knows or does not know what is the entire sum is immaterial as he is not being charged with misappropriation of the whole amount in the safe but that amount which he knowingly takes out. In this case the respondent was charged for misappropriation of specific sums which he had withdrawn from the bank and not the entire funds in the bank. He knew exactly how much was being taken out because he wrote out the cheques himself and he knew that the sums were part of the school funds in the bank and that they did not belong to him. I hold that there is overwhelming evidence of entrustment in the case.

My discussions on the question of entrustment, however, become a matter of academic value because of my earlier ruling on the competency of the appeal on the other two charges.

As to the third charge, the learned President found sufficient evidence to denote the amount paid into the bank and the purpose of such payment. He was also satisfied that a sum of $1,964 meant for the Teachers Provident Fund had been credited into the school account and that the respondent, instead of issuing a cheque for a similar amount to the appropriate authority, had dishonestly made out a cash cheque, cashed and misappropriated the money. With these findings of fact I fully agree.

The respondent's defence is very simply this — he normally made various purchases for items required for the school's use through his teachers. One of them was his witness, one Mr. Neo. The cheque for $1,964 was handed over to Mr. Neo, who was instructed to cash it and make various payments to various creditors of the school including a sum of over $1,00[illegible] the Syarikat Guru Melayu. Mr. Neo subsequently informed him that the sum was insufficient to pay all of them. He could not remember who the creditors were and/or the amount owing to them. He explained that the discrepancy between the cheque butt for $1,964, which bears the letters TPF and the cheque which was made out as cash, was due to subsequent realisation that other more urgent payments had to be made.

The learned President appeared to have accepted the respondent's story. He was of the opinion that, as the respondent had merely misused the money for the Teachers Provident Fund to settle other payments due by the school, he could not be said to have a dishonest intention.

In particular the learned President was led into accepting the absence of dishonest intention by the following: —

(i) The respondent could not remember the particulars of payments made to Syarikat Guru-Guru Melayu and in satisfaction of other bills because the incident happened way back in 1971 (respondent gave evidence on November 6, 1978).

(ii) Different entries made on cheque butt and cheque were due to subsequent need to make other urgent payments.

(iii) Certification at the back of the form dated December 19, 1971 (i.e. 16 days after he had cashed the cheque meant for that payment) was done by him without checking its contents.

(iv) The explanation by the respondent in the letter dated July 6, 1972 stating that the cheque was prepared on February 11, 1972 but was discovered later to be not posted which was accepted by PW4 negatived dishonest intention on the respondent's part.

Now the learned President was, of course, entitled to draw his own conclusions and arrive at his own views as regards the respondent's credibility and intentions, but, before coming to such conclusions or adopting such views, he owed a duty to reassess the prosecution case in the light of the evidence adduced by the defence, particularly so when the defence case rested on verbal assertions and denials which were unsupported by other evidence.

The first finding by the learned President at first sight and when considered on its own merits appears to be plausible. An interval of six years may somewhat cloud the respondent's memory about the small payments he had made. But I am unable to accept that he could not remember about the one particularly large payment which he claimed to have been made to the Syarikat Guru-Guru Melayu. He could have checked this from his own school accounts and, if the accounts were improperly kept, as he wanted the court to believe, there is nothing to prevent him from ascertaining this from the Syarikat itself. The respondent took no steps to procure the receipt or obtain any other proof to establish this payment, but instead chose to refute the prosecution evidence by mere verbal assertions in court. The respondent, as could be seen from the record, was first charged on January 23, 1973, i.e. 1 year and 3 months after the alleged offence, by which time he could have known what facts he would require for his defence to such a serious charge. Such indifferent and indolent attitude of the respondent cannot be said to be consistent with the act of a reasonably innocent person. But the most glaring contradiction to this defence of inability to account due to lapse of time came from the evidence of PW19, the Government Auditor for Negeri Sembilan and Malacca, who testified that in 1971, i.e. the year in which the offence was alleged to have been committed, he had attempted to audit the accounts, that the respondent started to cry when asked to produce his account books. This goes to show that

the respondent was aware throughout from October 1971 until 1973, when he was charged, of the need to account for his payments. The learned President's finding when taken with these surrounding facts appear to be sadly incongruous.

Regarding his finding in (ii) above, the learned President appeared to have accepted *in toto* the respondent's explanation without proper examination of the evidence before him. He had accepted the respondent's account that the cheque butt (P17) was prepared some 3 or 4 days prior to the cheque itself (P14) and that it was during the intervening 2—3 days' period that he had realised the urgent need to pay bills and so had written the cheque out as 'cash' instead of the 'Teachers Provident Fund' to facilitate payments. What surprises me most is how an experienced President had been led without reservation into believing that in the ordinary course of events a person would enter his cheque butt first and only after 2 or 3 days commence to write out the cheque. And if this is not sufficiently whimsical, what of the respondent's written note to the Chairman (PL5) in which he attempted to pull wool over the Chairman's eyes by stating that the cash was needed to purchase money orders with which he would pay the E.P.F. In short, the respondent is saying that he wrote 'cash' on the cheque and T.P.F. on the butt because he wrote the latter first and a couple of days later, on realizing that he had to settle school debts, he wrote out a cash cheque instead. Well, that is certainly illogical, if not untruthful, because, as I said earlier, when he gave the note to the Chairman of the Board, he was, on his own admission, fully aware of his intention to draw out cash and not to pay the T.P.F. Yet he hid this fact and falsely misled the Chairman into believing that the cheque was intended to pay the T.P.F. On this fact too I hold that the learned President had erred in applying the proper consideration. Then again, if he wanted cash, why not a round figure — not $1,690, especially so when he did not know the exact sum to be paid.

The third finding of fact also merits qualification. It was contended by the respondent that he certified the payment of the T.P.F. without checking the contents and therefore he had no dishonest intention. To understand the situation well one has to look at the certification on the reverse of Exhibit P20. The certification is a simple one relating to Salary, E.P.F. and T.P.F. It was well-spaced and neatly and shortly paragraphed. The relevant portion that is applicable in this case is set out in two short paragraphs which run as follows: —

"(a) I have despatched all other cheques as above, in respect of deductions from gross contribution to the appropriate departments.

(b) I have completed Form A in respect of E.P.F. and T.P.F. deductions."

Now it would only take a glance for any educated person to appreciate what they mean and especially so for the respondent, who not only was the headmaster having charge over financial matters of the school but also, according to his own evidence, was familiar with it as a routine matter. If the unchecked matter relates to the correctness of the figures, such a claim by the respondent might have been probable, but surely not when they relate to the simple issue as to (a) whether he had paid the E.P.F. and T.P.F. and (b) whether he had completed the forms intended for their deductions. The answers to both are either 'yes' or 'no'. It is implicitly clear from the evidence that he knew that he had used the T.P.F. payment for some other purpose only 16 days prior to the certification and that he did not fill up the forms. Surely there was no necessity for checking something the answer to which needed no detailed reference and in respect of which he had personal knowledge. In the light of this evidence his excuse appears to be rather naive.

Fourthly and lastly the learned President relieved the respondent of any dishonest intention merely because the respondent's letter explaining the delay in remitting the cheque due to an oversight had been accepted by PW4, the Accounts Supervisor of the T.P.F. With due respect to the learned President, I do not see how a mere acceptance of the respondent's explanation can speak for the respondent's innocence. Now PW4, Jernial Singh, was T.P.F. Supervisor attached to the Ministry of Education. He had said in evidence that there was no indication on the forms to show when the deductions were made from the teachers' salaries except from the covering letter from the respondent. He and the other members of the Board in Kuala Lumpur were accepting the respondent's explanation because they were treating in good faith what the respondent said was true. At that time there was no suggestion that the respondent had misappropriated the payments. They were not aware that the cheque, as issued in the first instance, had been cashed by the respondent; they were unaware of the discrepancies between the cheque butt and the cheque originally issued; they were not informed of the respondent's note to the Chairman and a host of other evidence which have been produced before the court below. They were unaware that the letter was a complete lie because the reason, as given before the trial court by the respondent, was that payment was not made due to the urgent need to utilize the T.P.F. money for other pressing purposes of the school.

The learned President had all this evidence available before him when he wrote out his judgment but obviously did not consider them. Otherwise he could not have possibly attached much weight to a mere remark by an unsuspecting T.P.F. Supervisor, who, at that stage when he received the letter, had no recourse to other incriminating evidence warranting investigation or raising doubt as to what the respondent said was untrue.

On the whole I am satisfied that the learned President had failed to take proper consideration of facts which are immensely material towards the determination of the respondent's intention and consequently the prosecution's case. Had he weighed those evidence I am convinced that he would have arrived at a different conclusion entirely.

It has been submitted far too frequently in this court that in my appellate jurisdiction I should not

interfere with the findings of facts by the court below. It is true that appellate courts are usually slow in disturbing findings of facts made by the trial judge, but I can find no rule which restricts my function here only to that of a judge of law and not of facts. It is the duty of the court on appeal to review all evidence presented before the lower court and, if it feels that certain material facts have been missed or improperly considered by the presiding President or Magistrate, then it should not hesitate from performing its duty as a judge of facts to consider and weigh those facts and decide whether those facts could have altered their judgment in one way or another.

The entire defence of the respondent had been placed before the learned President, who accepted it as probable solely on the basis of reasonable explanation on his incriminating conduct given by the respondent himself. The defence, as had been fully presented, was founded wholly on this explanation, which the learned President considered had negated the respondent's *mens rea*. But he had so found because of his omission and misappreciation of material facts. Had he taken the overwhelming facts and inferences, which I have dealt with earlier, into consideration and applied his proper reasoning, I am certain that he, as any reasonable President, would have found that the respondent had failed to refute or negate or even raise any reasonable doubt as to the existence of his proven intention to misappropriate.

As the respondent's defence lies squarely on the acceptance or rejection of facts relating to his intention, I do not see any other defence being open to him meriting further consideration of his case by the learned President. Accordingly I would revise the learned President's findings, set aside the order of acquittal made by him in respect of the 3rd charge, find the respondent guilty of the offence as charged and substitute the order of acquittal with that of conviction.

Sentence: (To the respondent).

I find it most disquieting to punish you. You are a complete stranger to me but not to the profession to which you belong. Men of whatever professional standing owe their success to the educational heritage from their past teachers. People of your profession are reputed for their proficiency and probity. They are people who would willingly forgo the glamour and gains of a more lucrative office in order to dedicate their lives towards the educational and moral upbringing of our children. Even for the very enlightened and the aged, the vision and image of his past teachers must necessarily be one of respect, reverence and venerate adoration. Now the nation has entrusted on people like you the arduous and delicate duty of shaping the destiny of our future generation. You are considered to be the exemplar of cultural virtues and as such your minutest actions and deportment will attract immediate imitation from your pupils. It is imperative, therefore, that you maintain the highest quality of ethics, in particular. honesty and respect of the law. But, unfortunately, you have transgressed both by your fraudulent acts. You managed to pull the wool over the eyes of the Chairman and the entire members of the Board of the school with unbelievable ease and they, in turn, yielded to your despicable design out of their sure and probably blissful ignorance. You then proceeded to plunder the funds entrusted to you with no apparent compunction — all for the price of the instalments of your wife's second-hand car.

Section 409 of the Penal Code, the section under which you have been convicted, prescribes a very heavy punishment. But that alone should not form the sole yardstick for your punishment. This court will take all mitigating factors into consideration so that the punishment imposed will be neither harsh nor excessive. Your counsel has devoted a bigger part of his mitigation plea on your past character and your contribution to society. I have taken notice of them. But I also have a public duty to perform and that duty necessitates the imposition of punishment on you. Although that punishment will neither reflect your counsel's hope nor the wish of the learned Deputy, it is something I consider fair in the circumstances.

You have disgraced both yourself and your profession. As a result, you will, no doubt, lose your position, your calling and, above all, the respect which you have commanded as a headmaster. The job of a master, teacher and adviser to our future generation is indeed an honourable one and you have lost it by merely, as the records speak, through your inability to cut your coat according to your cloth. It is distressing to note that a single act of dishonesty had demolished a respectable profession which had taken the best years of your life to build. The loss of your job and the humiliation suffered by this conviction are by themselves a substantial part of your punishment.

I sentence you to a day's imprisonment and a fine of $2,500, in default, 5 months' imprisonment.

Appeal as regards 3rd charge allowed.

Solicitors: *Joseph & Son.*

RE DATUK HARUN BIN HAJI IDRIS*

[O.Cr.J. (Hashim Yeop A. Sani J.) November 18 & 22, 1980]
[Kuala Lumpur — Federal Territory Criminal Application No. 16 of 1980]

Administrative Law — Habeas Corpus — Sentences of High Court — Confirmed and varied by Federal Court — Whether sentences concurrent or consecutive — Power of Superior Court to alter or review judgment — Warrant of Commitment — Criminal Procedure Code (F.M.S. Cap. 6), ss. 278, 282, 292.

Criminal Law and Procedure — Accused sentenced in respect of two cases — Whether sentences concurrent or consecutive — Power of court to alter or review judgment — Warrant of Commitment — Criminal Procedure Code (F.M.S. Cap. 6), ss. 278, 282 & 292.

In this case the applicant had been convicted on three charges under the Prevention of Corruption Act, 1961 and sentenced to one year imprisonment on the first charge and two years' imprisonment on the second and third charges, the sentences to run concurrently. These sentences were confirmed on appeal. Subsequently the applicant was again convicted on two charges under the Penal Code and was sentenced to six month's imprisonment on the first charge and fined $15,000 on the second charge. On appeal the Federal

* On appeal by the applicant, the Federal Court reserved judgment on January 21, 1981.